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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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FILE:



Office: NEW DELHI, INDIA

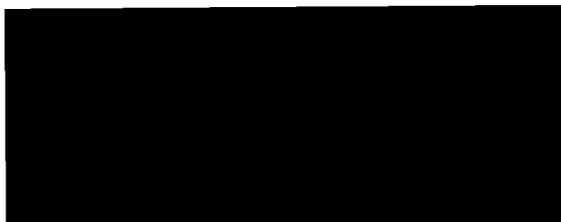
Date: **MAY 29 2010**

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the  
Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Perry Rhew for".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge, New Delhi, India. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen will be granted, the September 19, 2007 AAO order dismissing the appeal will be withdrawn, and the appeal will be sustained.

The applicant is a native and citizen of India who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud or willful misrepresentation. The applicant is married to a naturalized U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with his wife in the United States. On June 25, 2002, the officer in charge found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Officer in Charge*, dated June 25, 2002. The AAO dismissed this appeal on February 26, 2004. *Decision of the Administrative Appeals Office*, dated February 26, 2004.

In September 2005, the applicant filed a new waiver application. The officer in charge again found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Officer in Charge*, dated March 28, 2006. On September 19, 2007, the AAO found that the applicant established extreme hardship to a qualifying relative, but dismissed the appeal on discretionary grounds. The AAO found that the applicant misrepresented the circumstances surrounding the applicant's wife's miscarriage in order to expedite the adjudication of the appeal. Specifically, the AAO found that although the applicant's wife gave birth to a stillborn baby on June 11, 2007, counsel failed to report the stillbirth in his June 25, 2007 letter and submitted photographs of a purported "one day old" baby who was "not expected to survive." The AAO concluded that "the applicant has, once again, relied on misrepresentation to obtain an immigration benefit" and dismissed the appeal. *Decision of the Administrative Appeals Office*, dated September 19, 2007.

On the present motion, counsel certifies under penalty of perjury that he, and he alone, was responsible for any misrepresentation to the AAO. Specifically, counsel contends that he "never realized that in [his] June 25[, 2007] letter [to the AAO, that he] had not mentioned anything about the stillborn child," that "[a]ll [he] was doing as an attorney and an advocate was to see that the appeal was decided as expeditiously as possible," and that "[t]here was no concerted plan or conspiracy to accomplish a result (expeditious decision on appeal) without any base or need." *Attorney Affirmation*, dated October 18, 2007.

In support of the motion, counsel submits an affirmation as well as an affidavit from the applicant's wife, [REDACTED]

According to the regulation at 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. A motion that does not

meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The present motion is properly characterized as a motion to reopen, and will be granted.

On September 19, 2007, the AAO found that the applicant established extreme hardship to a qualifying relative, but dismissed the appeal on discretionary grounds. The AAO affirms the finding of extreme hardship for the reasons set forth in its previous decision.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The AAO must “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996)(citations omitted).

The AAO’s decision to dismiss the appeal on discretionary grounds was based entirely on counsel’s June 25, 2007 letter which suggested that the couple’s baby was alive although “not expected to survive.” Significantly, counsel affirms that any misrepresentation to the AAO was solely his mistake. Counsel contends that he quoted the attending medical doctor’s statement and “there was no intention on [his] part to mislead the AAO.” He states that “[w]hile [he] failed to mention that the baby was stillborn, the basic idea was to convey a feeling of emergency that deserved an expeditious treatment.” Counsel notes that, “[i]n [his] mental thought-process, whether the baby was not expected to survive or did not survive was not quite that important.” *Attorney Affirmation, supra*.

██████████ affidavit substantiates this claim and explains the timing of the events as they unfolded in June of 2007. The affidavit from ██████████ states that on June 10, 2007, she was rushed to the emergency room in “unbearable pain.” She contends she was told she would have a miscarriage, called counsel late at night “begging him to do whatever he could to help [her husband] come to the United States to be with [her],” and was “not [her] regular self, . . . half delirious and really losing [her] senses.” She asserts that she did not know and never intended on misrepresenting the circumstances of her miscarriage to the AAO. *Affidavit in Support of Motion to Reopen* by ██████████ dated October 17, 2007.

Based on this new information, the AAO finds that neither the applicant nor his wife willfully misrepresented the birth of their child in order to obtain the expedited approval of the applicant’s waiver application.

In view of the new evidence, the AAO finds that the applicant merits a favorable exercise of discretion. The adverse factor in the present case includes the applicant’s fraudulent use of documents for an immigration benefit in 1998. The favorable and mitigating factors in the present case include: the applicant’s family ties to the United States, including his U.S. citizen wife; the extreme hardship the applicant’s wife would experience if the applicant’s waiver

application were denied; the applicant's remorse at attempting to use fraudulent documents in 1998; the passage of eleven years since the applicant's immigration violation; and the applicant's lack of any criminal convictions.

The AAO finds that, although the applicant's immigration violation is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.